Supreme Court, U.S.
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No. 09-743

# In The
# Supreme Court of the United States

STEVEN ROSENBERG,

*Petitioner,*

v.

HUALAPAI INDIAN NATION,

*Respondent.*

**On Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Arizona**

## BRIEF IN OPPOSITION

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## QUESTIONS PRESENTED

(1) Applying this Court's decision in *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), which held that an Indian Tribe enjoys sovereign immunity even for its off-reservation, commercial conduct, does the Hualapai Tribe enjoy such sovereign immunity?

(2) Although "[i]t is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed,'" *e.g.*, *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-56 (1978), should a release signed only by the Petitioner before he was injured, which expressly releases the Hualapai Indian Nation from any liability, be somehow interpreted as an implied waiver by the tribe of its sovereign immunity?

## ALL PARTIES TO THE PROCEEDINGS

The caption to the case contains the names of all parties who participated in the appeal below. Hwal'Bay Ba:J Enterprises, Inc., Grand Canyon Resort Corporation, and Dugan Steele, were named as defendants in the plaintiff's complaint, but were never served.

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## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

## OPINIONS BELOW

The Mohave County Superior Court dismissed the complaint and the amended complaint on the basis of sovereign immunity. Its orders are unpublished. Clerk's Record 15, 19. The Arizona Court of Appeals affirmed dismissal on the basis of sovereign immunity. Pet. App. 5-17. That opinion is also unpublished, but can be accessed electronically. *See Rosenberg v. Hualapai Indian Nation*, 2009 WL 757436 (Ariz. Ct. App. Mar. 24, 2009). In another unpublished order, the Arizona Supreme Court declined to review the Arizona Court of Appeals' decision. Pet. App. 1-2.

## JURISDICTION

The case was disposed of in the Arizona Court of Appeals and Supreme Court of Arizona. The Petitioner is mistaken that jurisdiction exists pursuant to 28 U.S.C. § 1245(1).

## STATUTORY PROVISION INVOLVED

The Petition (at 4-7) states that no Constitutional or statutory provisions are involved, then quotes only a federal regulation, which is not addressed at all in

the argument stating the reasons Petitioner believes review should be granted.

## STATEMENT OF THE CASE

Respondent, the Hualapai Indian Nation (the "Tribe"), is a federally-recognized Indian tribe located on the Hualapai Indian Reservation in northwestern Arizona. The Reservation was established by an Executive Order of President Arthur on January 4, 1883, consists of approximately 1 million acres of land held by the United States in trust for the Tribe, and is the home of approximately 1,350 tribal members. *See United States v. Santa Fe Pac. R.R.*, 314 U.S. 339, 356-58 (1941) (holding that the Executive Order establishing the Reservation extinguished the Tribe's aboriginal title outside the Reservation). The Executive Order established the northern boundary of the Reservation as running "along [the Colorado] River" for 108 miles, most of which are in the Grand Canyon.

Petitioner Rosenberg traveled to the Reservation on June 21, 2005, and the next morning contracted with Hualapai River Runners[1] for a day-long white

[1] The Tribe operates Hualapai River Runners through its wholly-owned tribal enterprises. Clerk's Record 7. Hualapai River Runners is a day-long white water rafting operation down the Colorado River from docks on the southern bank of the river on the Reservation. The tribally-owned enterprise is a central

(Continued on following page)

water rafting trip. Pet. at 10. Petitioner purchased a ticket for the trip and was required as a condition of taking the trip to sign an "Assumption of Risk and Responsibility and Release of Liability" (the "Release"). Pet. at 10; Pet. App. 53-57. Among other things, the Release states:

> RELEASE: In consideration of services or property provided, I, and any minor children for which I am parent, legal guardian or otherwise responsible, any heirs, personal representatives or assigns, do hereby release:
>
> THE HUALAPAI TRIBE AND ITS BUSINESS CORPORATION, HWAL'BAY BA:J ENTERPRISES, INC. DOING BUSINESS AS GRAND CANYON RESORT CORPORATION.
>
> Its council members, principals, directors, officers, agents, employees and volunteers, from all liability and waive any claim for damage arising from any cause whatsoever.
>
> I have read the foregoing acknowledgment of risk, assumption of risk and responsibility, and release of liability. I understand that by signing this document I may be waiving valuable legal rights.

Petitioner's Release also acknowledged that "there are inherent dangers in this activity" of white water

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feature of the Tribe's efforts to provide employment for its members and attain economic self-sufficiency.

river rafting. Petitioner was injured when he fell out of a boat while rafting on the Colorado River with the Hualapai River Runners. Clerk's Record 1 at ¶ 1, 16.[2]

Petitioner filed suit against the Tribe in the Mohave County Superior Court on February 16, 2007. Clerk's Record 1. Pet. App. 24-31.[3] Petitioner named, but did not serve Hualapai River Runners, which is not a party to this suit.

The trial court dismissed the case on the basis of sovereign immunity. Pet. App. 22-23. The Arizona Court of Appeals affirmed in an unpublished memorandum decision. Relying on allegations in Petitioner's Complaint, the Court of Appeals "assume[d] that [Petitioner] . . . was injured outside the geographic boundaries of the Tribe's reservation." Pet. App. 6-7. The Court of Appeals held that the Tribe has sovereign immunity for torts occurring off of the

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[2] There is a historical dispute between the Tribe and the federal government regarding the boundaries of its Reservation (the river bank or middle of the river) and current federal regulations exempt the Tribe from any regulations regarding rafting on the Colorado River. *See* 36 C.F.R. § 7.4(b). Whether Petitioner's accident occurred "off-reservation" because he fell out of the boat closer to the north bank, rather than the south bank of the river, is a fact question that need not be resolved here. The state court accepted as true Petitioner's allegation that the accident occurred off-reservation, basing its holding on the Tribe's immunity from suit.

[3] Initially, Petitioner filed suit in tribal court, but voluntarily dismissed that action. He then filed a state court complaint which abated for non-service, before he filed the complaint resulting in these proceedings. Pet. App. 8 n.1.

Reservation, relying on this Court's decision in *Kiowa Tribe v. Manufacturing Technologies Inc.*, 523 U.S. 751 (1998), and that the Tribe did not waive its immunity by requiring the plaintiff to sign a release form before participating in the river rafting trip, Pet. App. 13-15, relying on this Court's decisions in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978) and *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505 (1991), both of which hold that any waiver of a Tribe's immunity must be clearly expressed. The Arizona Supreme Court declined discretionary review. Pet. App. 1.

## REASONS FOR DENYING THE PETITION

### I. The Decision Below Is Consistent with Almost Two Centuries of this Court's Jurisprudence Upholding Tribal Sovereignty.

Petitioner presents no circuit split nor any state court decision that is repugnant to any Constitutional provision, treaty, or federal statute. Petitioner merely disagrees with the existence of tribal sovereign immunity as applied by the Court in *Kiowa*.

For "nearly two centuries," Indian tribes have been recognized as sovereign nations. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2718 (2008). Inherent in that sovereignty is the affirmative defense of sovereign immunity. *United States v. USF&G Co.*, 309 U.S. 506, 512-13 (1940).

Petitioner acknowledges (at 15-16) this Court's long-standing recognition of the existence of tribal sovereign immunity. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557 (1832).[4] Most recently, the Court held that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998).

This Court has consistently held that the immunity doctrine protects tribes against suit in state courts. *E.g., Kiowa*, 523 U.S. at 755-56; *see also Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. at 510; *Puyallup Tribe*, 433 U.S. at 172-173. In *Kiowa* the Court applied the rule that "tribal immunity is a matter of federal law and is not subject to diminution by the States" and held that a tribe could not be sued in state court in a contract action absent its consent or congressional authorization. 523 U.S. at 756.

In *Puyallup Tribe*, which involved the exercise of treaty fishing rights by tribal members, the Court also applied the principle that, "[a]bsent an effective waiver or consent, it is settled that a state court may

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[4] Since *Worcester*, this Court has recognized the existence of tribal sovereign immunity in every decision on this subject. *See, e.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *Puyallup Tribe, Inc. v. Dept. of Game*, 433 U.S. 165 (1977); *United States v. USF&G Co.*, 309 U.S. 506, 512 (1940).

not exercise jurisdiction over a recognized Indian tribe." 433 U.S. at 172. The Court consequently invalidated a Washington state court order directing the Tribe to file with the court a list of tribal members authorized to exercise treaty fishing rights and the number of fish caught by such fisherman because it infringed on the Tribe's sovereign immunity and exceeded the state court's jurisdiction.

In *Citizen Band Potawatomi*, the Court explained that:

> Congress has always been at liberty to dispense with such tribal immunity or to limit it. Although Congress has occasionally authorized limited classes of suits against Indian tribes . . . Congress has consistently reiterated its approval of the immunity doctrine. *See, e.g.,* Indian Financing Act of 1974, 88 Stat. 77, 25 U.S.C. § 1451 *et seq.*, and the Indian Self-Determination and Education Assistance Act, 88 Stat. 2203, 25 U.S.C. § 450 *et seq.* These Acts reflect Congress' desire to promote the "goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 216 (1987). Under these circumstances, we are not disposed to modify the long-established principle of tribal sovereign immunity.

498 U.S. at 510.

*Kiowa* reaffirmed that tribal sovereign immunity is "settled law" and declined an invitation to revise it, citing Congress' past reliance on the doctrine and power to alter it. 523 U.S. at 758-59. Congress has continued to take an active role in assessing the tribal immunity doctrine. While Congress has amended a prior statute to require that certain tribal contracts waive or otherwise address tribal immunity, *see* 25 U.S.C. § 81, *amended by* Indian Tribal Economic Development and Contract Encouragement Act, Pub. L. No. 106-179, § 2, 114 Stat. 46 (2000),[5] it has otherwise reaffirmed that tribal immunity should continue to apply with full force, *see* Tribal Self-Governance Amendments, Pub. L. No. 106-260, § 516, 114 Stat. 711 (2000).[6]

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[5] In the amendment, Congress provided that any tribal contract subject to the Secretary's approval must include provisions that either: (1) define remedies in the event of a breach; (2) reference tribal laws that disclose the tribe's right to assert sovereign immunity; or (3) include an express waiver of the tribe's sovereign immunity and any limitations on that waiver. 25 U.S.C. § 81(d)(2) (as amended).

[6] In this Act, Congress reaffirmed its approval of the tribal sovereign immunity doctrine by requiring that provisions of the Indian Self-Determination and Education Assistance Act, including the Act's recognition of the immunity doctrine, 25 U.S.C. § 450n, apply to tribal health programs covered by the 2000 Amendments. *See* H. REP. NO. 104-477, at 32 (1999), *reprinted in* 2000 U.S.C.C.A.N. 573, 589.

Petitioner incorrectly claims (at 22) that *Kiowa* "was notably silent on whether immunity extended to a tribe's commercial, extra-territorial tortious conduct." To the contrary, the majority opinion in *Kiowa* specifically refused to narrow the scope of its holding in that regard: "Respondent does not ask us to repudiate the principle outright, but suggests instead that we confine it to reservations or to noncommercial activities. *We decline to draw this distinction in this case, as we defer to the role Congress may wish to exercise in this important judgment.*" *Kiowa*, 523 U.S. at 758 (emphasis added). In reaching this decision, *Kiowa* did not create a new legal rule with respect to immunity.[7] Rather, it cited and followed earlier precedent. As the Court acknowledged:

> To date, our cases have sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred. . . . Nor have we yet drawn a distinction between governmental and commercial activities of a tribe. Though respondent

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[7] "[S]tate sovereign immunity serves the important function of shielding state treasuries and thus preserving the States' ability to govern in accordance with the will of their citizens." *Federal Maritime Comm'n v. South Carolina Ports Auth.*, 535 U.S. 743, 765 (2002). In the case of tribal sovereignty, commercial activities of the tribe are not distinguished from other governmental activities. "Self-determination and economic development are not within reach if the Tribes cannot raise revenues and provide employment for their members." *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 218-19 (1987) (where gaming was the commercial activity).

> asks us to confine immunity from suit to transactions on reservations and to governmental activities, our precedents have not drawn these distinctions.

*Kiowa*, 523 U.S. at 754 (citing *Puyallup Tribe*, 433 U.S. at 165; *Okla. Tax Comm'n*, 498 U.S. at 505; *USF&G Co.*, 309 U.S. at 506). Accordingly, in recognizing the applicability of sovereign immunity, "nothing in the Court's reasoning limits the rule to lawsuits arising out of voluntary contractual relationships." *Kiowa*, 523 U.S. at 766 (Stevens, J., dissenting).

Petitioner also acknowledges that "lower courts have consistently construed *Kiowa*" to apply to tort actions as well as those arising in contract, Pet. at 23-24 & n.3, and he does not point to any conflict between the decision below and any holding by a federal court of appeals or the highest court of any State. *See also Tribal Smokeshop, Inc. v. Alabama-Coushatta Tribes ex rel. Tribal Council*, 72 F. Supp. 2d 717, 719 (E.D. Tex. 1999); *Filer v. Tohono O'Odham Nation Gaming Enter.*, 129 P.3d 78 (Ariz. Ct. App. 2006); *Redding Rancheria v. Superior Court*, 105 Cal. Rptr. 2d 773, 776 (App. 2001); *Trudgeon v. Fantasy Springs Casino*, 71 Cal. App. 4th 632, 637 (1999). *Beecher v. Mohegan Tribe of Indians*, 918 A.2d 880 (Conn. 2007); *Foxworthy v. Puyallup Tribe of Indians Ass'n*, 163 P.3d 53, 55 (Wash. Ct. App. 2007).

In urging that certiorari be granted, Petitioner instead relies heavily on a comment in *Kiowa*, which suggests that the broad application of immunity "can

harm those who are unaware that they are dealing with the tribe, who do not know of tribal immunity, or who have no choice in the matter, as in the case of tort victims." Pet. at 1 quoting *Kiowa*, 523 U.S. at 758. Petitioner is not, however, the "unwitting tort victim" referenced in *Kiowa*'s dicta. To the contrary, Petitioner was aware that he was dealing with the Hualapai tribe when he *voluntarily* purchased his tickets for the river rafting tour with the Hualapai River Runners in advance. He *knowingly* entered onto the Hualapai reservation to participate in the excursion with the tribal enterprise, knowing river rafting to be a dangerous activity. He signed a release in which the Tribe was clearly identified as the vendor. In other words, Petitioner did "have a choice in the matter" and chose to enter into a commercial transaction with the Tribe; he was not a victim of a tort outside a reservation that simply happened to be committed by a tribal enterprise where he was ignorant of its tribal character. Thus, Petitioner's case here, though framed as a tort action, did arise from a voluntary contractual relationship akin to that of the actual plaintiff in *Kiowa*, rather than the unwitting tort victim hypothesized there. Accordingly, even if *Kiowa* had left "open" the question of whether immunity applies to off-reservation torts, this case does not provide an appropriate vehicle to address that question.

In a final attempt to create the illusion of a worthy question presented, Petitioner (at 14-21) attempts to force an analogy between tribal immunity

and the immunity afforded to foreign nations pursuant to the Foreign Sovereign Immunities Act ("FSIA"). 28 U.S.C. § 1602 *et seq.* Tribal immunity is not identical to the immunity of foreign nations nor is it subject to any limitations that Congress may have established for claims against foreign countries in FSIA. *See* 28 U.S.C. § 1605. To the contrary, the fact that Congress chose to limit the immunity of foreign sovereigns underscores the broader immunity retained by tribal sovereigns in the absence of congressional action. For example, in *Kiowa* this Court held that tribal immunity encompasses even the commercial activities of the tribe.[8] By contrast, under FSIA, foreign sovereigns do *not* retain immunity for their commercial activities. Moreover, FSIA permits a waiver of immunity to be implied, *see* 28 U.S.C. § 1605(a)(1), while this Court has repeatedly emphasized that a waiver of tribal immunity must be express and unequivocal to be effective. *See Santa Clara Pueblo v. Martinez*, 436 U.S. at 55-56 (1978) (citations omitted) ("It is settled that a waiver of sovereign immunity 'cannot be

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[8] Congress had already passed FSIA at the time *Kiowa* was decided. The *Kiowa* Court compared and contrasted the limitations FSIA imposed on foreign sovereigns and those imposed upon tribal sovereigns through provisions of the Indian Gaming Regulatory Act (25 U.S.C. § 2701) and Indian Self-Determination and Education Assistance Act (25 U.S.C. § 450). *See Kiowa*, 523 U.S. at 758-59. If it was appropriate to apply FSIA to tribal sovereigns, then the Court could have done so in *Kiowa*, but did not. Instead, it identified the distinct limits imposed on each by Congress and gave deference to those legislative enactments.

implied but must be unequivocally expressed.'"). Thus, to apply FSIA to limit the scope of tribal immunity would contradict this Court's precedent in addition to undermining congressional intent.[9]

In summary, this case does not present any novel question of federal law, but merely demonstrates the application of the well-established doctrine of sovereign immunity to bar a suit against a federally recognized Indian tribe in state court. Accordingly, there is no compelling reason for this Court's discretionary review of the unpublished Arizona Court of Appeals decision. *See* Sup. Ct. Rule 10 ("A petition for a writ of certiorari will be granted only for compelling reasons."). The Petition for Certiorari should be denied.

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[9] The Petition (at 26) opines that this Court should not "infer" congressional intent that tribal immunity be retained by virtue of its failure to enact legislation limiting tribal immunity in the same way foreign sovereigns are limited. The Court need not make a negative inference of congressional intent based on Congress' failure to act to restrict tribal immunity. As noted in *Kiowa*, Congress *has* restricted tribal immunity under limited circumstances. *See Kiowa*, 523 U.S. at 758-59. Affirmative congressional acts, which limit tribal immunity – though not to the extent set forth in FSIA – evidence Congress' affirmative intent to permit tribal sovereigns to retain immunity beyond that left to foreign sovereigns.

## II. Petitioner's Claim that the Release *He* Signed Constitutes an Implied Waiver by *the Tribe* of Its Immunity Is Absurd.

"It is settled that a waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo v. Martinez*, 436 U.S. at 55-56 (1978) (citations omitted).[10] Indeed, "[t]here is a strong presumption against waiver of tribal sovereign immunity." *Demontiney v. United States*, 255 F.3d 801, 811 (9th Cir. 2001). Any purported waiver of immunity "must be 'construed strictly in favor of the sovereign,' and not 'enlarge[d] . . . beyond what the language requires.'" *United States v. Nordic Village Inc.*, 503 U.S. 30, 34 (1992) (citations omitted).

Notwithstanding the requirement that any waiver must be both express and made by the tribe, Petitioner nevertheless argues that *his* waiver of liability *against the Tribe* should somehow be construed as waiving *the Tribe's* immunity from suit by him. That

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[10] Precedent consistently precludes any implied waiver of sovereign immunity. Waiver requires the intentional relinquishment of a right. *Schneckloth v. Bustamonte*, 412 U.S. 218, 238 (1973). "[T]o relinquish its immunity, a tribe's waiver must be 'clear.'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411, 418 (2001). *Accord Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991) ("[s]uits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe"). A similar requirement applies with respect to the sovereign immunity of the United States. "Such waiver cannot be implied, but must be unequivocally expressed." *Gilbert v. DaGrossa*, 756 F.2d 1455, 1458 (9th Cir. 1985).

argument misconstrues this Court's decision in *C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe*, 532 U.S. 411 (2001).

In *C & L Enterprises*, an *express* waiver was found to exist because the tribe explicitly agreed to be bound by an arbitration clause that anticipated enforcement in Oklahoma state courts. In contrast, the Tribe here did not expressly and unequivocally agree to waive its immunity from suit in any contract with Petitioner. To the contrary, in the Release, the sole source of the waiver urged by Petitioner, *he* agreed to waive any claim *he* might have *against the Tribe* and to release the Tribe of any liability. There is nothing in this instrument indicating that the Tribe expressly and unequivocally agreed to waive its inherent sovereign immunity, let alone consented to be sued in state court. Obtaining a signed acknowledgment of the waiver and release of any claim that might theoretically be made against the tribe cannot be considered an express waiver of sovereign immunity. *See, e.g.*, *In re SRC Holding Corp.*, 545 F.3d 661, 670 (8th Cir. 2008) ("Nothing prevents the parties from using a 'belt and suspenders' approach in drafting the exclusions, in order to be 'doubly sure.'").

Petitioner's comparison of the Release form here to the execution of a state licensing application at issue in *Bittle v. Bahe*, 192 P.3d 810 (Okla. 2008), Pet. at 29-30, is equally far-fetched. Similar to the arbitration agreement at issue in *C & L Enterprises*, the tribe in *Bittle* arguably agreed to submit to the

liquor laws of the State of Oklahoma when that tribe executed its licensing application to obtain a state issued liquor license. Consistent with this Court's reasoning in *C & L Enterprises*, the *Bittle* court held the tribe's agreement to be bound by Oklahoma law to be an explicit waiver of its sovereign immunity.

By contrast, the Tribe here made no agreement with the Petitioner to be bound by Arizona law or subject to suit in Arizona courts. Specifically, the Release form states no waiver at all by the Tribe. It is unilaterally signed by the Petitioner and only *he* agreed to be bound by its assumption of risk and release provisions. There is no basis for finding an explicit and unequivocal waiver of immunity by the Tribe. Accordingly, there is no compelling reason to grant certiorari as to the unpublished decision of the state court on this alternative issue, either. *See* Sup. Ct. R. 10.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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